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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MORTON E. STRAIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

Petition for Certiorari

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QUESTIONS PRESENTED

Was petitioner denied a fair trial and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution by: (1) The trial Court's refusal to permit petitioner's requested voir dire of the jury, (2) restricting the examination of a government witness, and (3) permitting the prosecution to testify in closing argument as to facts not in evidence and false.

TABLE OF AUTHORITIES

CASES

Berger v. U.S.
295 U.S. 78, 55 S. Ct. 629.....19, 24

Rosales-Lopez v. U.S.
101 S.Ct. 1629..... 21

Swain v. Alabama
380 U.S. 219, 85 S.Ct. 824..... 21

Taliaferro v. U.S.
47 F.2d 699..... 24

U.S. v. Lewin
467 F.2d 1132..... 21

U.S. v. Pimentel
654 F.2d 538..... 21

U.S. v. Rucker
557 F.2d 1046..... 21

STATUTES

United States Code
Title 18, §2..... 2
Title 18, §371..... 2
Title 18, §1001..... 2
Title 28, §1254(1)..... 1
Title 28 §1651(a)..... 1

TABLE OF CONTENTS

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF CASE..... 2

ARGUMENT..... 20

CONCLUSION..... 25

APPENDIX A 26

APPENDIX B 30

OPINIONS BELOW

The unpublished Memorandum Decision No. 81-1556 of the U.S. Court of Appeal for the Ninth Circuit which affirmed the Judgment of the U.S. District Court and the Order of December 14, 1982 which denied a rehearing.

JURISDICTION

The Memorandum Opinion of the U.S. Court of Appeals for the Ninth Circuit and Appendix A attached hereto, which petitioner seeks to have reviewed is dated August 18, 1982. The order denying a rehearing on December 14, 1982 is attached as Appendix B.

The jurisdiction of this Court is invoked under §1254(1) and §1651(a) of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was charged in a Federal Indictment with violation of Title 18 U.S.C. §2, §371 and §1001, i.e. principally conspiracy and theft of government property. He was convicted by a jury.

Petitioner had been in the business of hauling scrap for different companies. Sometimes he used his own truck and other times he used company trucks depending on the nature and extent of the loads.

Petitioner had been hauling loads of scrap for companies which buy from the Naval Air Station Scrap Yard in San Diego. The material sent to the scrap yard had been determined by the person

using it that it was not functional, obsolete, or damaged and should be discarded as nonusable scrap. The employees at the scrap yard did not determine what was sent to their yard. Any scrap which was considered to be usable was sent to a totally different scrap yard by the persons discarding the material.

The scrap in this nonusable scrap yard is always sold by weight. After this discarded material is delivered to the nonusable scrap yard, the employees collect the material into large open air bins usually by putting similar materials into the same bin. Once a bin is filled it is advertised for sale to the public and anyone in the world can offer a bid. All this scrap is sold by weight i.e. by the price per pound. These bins of scrap are open for inspection without restriction, by anyone who

wishes to bid on a bin.

Petitioner would usually go with the bidder during the inspection of a bin before the bid to estimate the cost of hauling the scrap.

In April 1980 petitioner hauled a bin of scrap stainless steel and burned jet engines for the purchaser, Airways Metals. In addition to hauling the scrap he had an agreement with Airways Metals that he would buy the jet engines at the same price per pound they had paid for them with the hope of selling them to Ontario Airparts at a profit since that company would not buy an entire bin of scrap only for the salvage value of the engines. However, that proved to be a mistake because the price per pound was more than the scrap value of the engines and Airways Metals and petitioner suffered a loss on the transaction.

Shortly after this in May, petitioner was hired to haul a load of scrap miscellaneous airparts from the Naval Air Station Scrap Yard for the successful bidder which was Ontario Airparts.

All these loads of nonusable scrap are checked and weighed when they leave the scrap yard and again when they are delivered to the successful bidder.

Later on in August, petitioner arrives at the Naval Air Station Scrap Yard. He had contracted to haul the contents of a bin of scrap miscellaneous aircraft parts for the successful bidder which was United Aero. When he arrived at bin 22, a scrap yard employee was there with a forklift for the purpose of loading the contents of the bin onto his truck. Most of the scrap parts in this bin are inside weather beaten crates. Upon his arrival at the bin he backs

his truck up to the side of the bin for loading of the crates which appear to have already been set outside the bin.

The contents of a scrap bin were never loaded directly from the bin itself. It was customary to have employees of the yard remove the contents and place them to the side of the bin for loading. After the scrap yard employee loaded petitioner's truck with his forklift, petitioner drove his truck to the scrap yard scales where the load was weighed and checked (all of this scrap was sold by weight). After this he proceeds to the gate of the Naval Air Station where he is stopped and detained by Naval Intelligence agents.

They tell him that the crates on his truck contain scrap circuit boards which were not part of bin 22 and were not to be sold.

They interrogate petitioner for almost four hours but do not keep a written or recorded record of this interrogation. They try to get petitioner to admit that he is the successful bidder of bin 22, not United Aero. Petitioner tells as much as he knows of the purchase of the bin and they translate his answers into an admission that he, in fact, could be the purchaser. However, they are not certain that their translation is correct and they release him without even an indication that they will ever contract him again.

The reason for their uncertainty is because their information as to this attempted theft has been furnished to them by a scrap yard employee named Watling. A few months earlier, Watling had begun working at the scrap yard after having been retired from the Navy.

Shortly, after beginning work at the scrap yard he went to the Naval Intelligence agents and offered his services as a spy for them in the hopes of advancing his position at the yard. He told them he would "fish" around for any irregularities.

In April, Watling had reported to the Naval Intelligence agents that he thought petitioner was stealing the crashed and burned jet engines when he hauled the scrap for Airways Metals. The agents were unimpressed and did nothing to pursue his information. However, months later when he told them that scrap circut boards (which were not to be sold because they contained a small amount of gold) which were next to bin 22 would be stolen, they agreed to investigate. He did not tell them who placed the crates of circuit boards

next to the bin nor that he was as responsible as any other scrap yard employee for moving them about the yard and seeing that they were put in the proper enclosure. This enclosure was a short distance from bin 22.

Nevertheless, he persuaded the agents to hide near the bin with a camera on the morning the contents of bin 22 were to be loaded. Petitioner arrived and the crates were loaded onto his truck because they appeared to be from the bin.

Now, the agents set out to gather evidence of a theft. First, everyone at the yard is questioned but denies any wrong doing. It is probably a mistake.

In order to justify this investigation they recall the shop foreman named Avila. This time, they show him the film of the loading of the truck and convince him it is sufficient proof of a crime

for which he is responsible. They tell him he has no alternative but to escape the consequences by becoming spy for them and furnishing needed testimony as well. They tell him that working for them will keep his job and also he will be paid. Avila is frightened and agrees. After this, they tell him who might be suspects.

Following their instructions Avila wears a concealed recording device, visits the previous scrap yard foreman and the forklift driver to engage them in an incriminating sounding conversation. In order to accomplish this he engages each of them in conversation in a confidential tone by telling them he is the victim of some careless procedures at the yard and because of the mistake anticipates being charged with a crime. They believe him and offer to help him and make suggestions as to what could cause

criminal liability for carelessness in the procedures in the yard.

Then, the agents go to the grand jury. In order to persuade the grand jury that it was not a mistake but a deliberate theft, Watling lied to them. He told them the jet engines hauled from the yard by petitioner were in good condition and had been concealed in the stainless steel bin. In fact, they had been crashed and burned and most of the metal in them was ferrous and of very little value. Airways Metals had actually paid the government far to much for those engines. Strangely, not one of the purchasers was investigated or charged.

The Grand Jury returned an Indictment and petitioner was tried in the Federal District Court.

At the trial the Court refused petitioner's request for even a brief voir

dire of the jury. The Court also refused to ask the jurors the questions submitted by counsel in writing.

Instead, the Court recited it's prescribed litany which asked the jurors if they would follow the instructions of the Court and thereby give petitioner a fair trial. This voir dire made very little inquiring as to a jurors predispositions or inclinations or attitudes regarding the subject matter of the case or the general applicable law.

After the jury had been impanelled one of the jurors become apprehensive, held up her hand, and asked the court if certain of her qualifications were signficant even though she had not been questioned about them. This was the kind of subject about which defense counsel had wanted to question the jurors if permitted to conduct a brief voir

dire. Even the written questions submitted by counsel were disregarded by the Court. But, in view of the juror's concern the Court permitted defense counsel a brief voir dire of that juror out of the presence of the other jurors. The Court agreed her answers to the questions which had been previously disregarded by the Court disqualified her as a juror. She was excused and the case was tried by the remaining eleven jurors.

At the trial Avila testified for the government that the previous foreman Estrada had admitted to him that he was to receive money for the crates of circuit boards and Avila was to receive a percentage of that sum. However, during the forty minute conversation when Avila wore the concealed recording device there was absolutely no mention of any such arrangement. Yet, the very purpose

of recording that conversation was to obtain such admissions. Furthermore, petitioner is not even mentioned.

When Watling testified at the trial he told the jury the jet engines were concealed in the bin of scrap stainless steel to steal them from the government. Also, from his observations some distance away he thought high temperature metal, which is more valuable than stainless was also being loaded. Despite the fact the supervisor of the yard Mr. Newark was present during the loading and testified that selling bins of scrap containing jet engines was proper.

Watling admitted he was not qualified to distinguish high temperature metal from any other metal. Later during the trial the prosecution stipulated that on at least two occasions after this prosecution bins of scrap stainless

steel also containing jet engines were sold to two different bidders at only three fourths the price paid by Airways Metal for whom petitioner had done the hauling.

Watling further testified that he knew the weather beaten crates of circuit boards next to bin 22 should have been put in the nearby enclosure and that all employees including himself are responsible for placing them in the enclosure. He told the jury he did not put them next to bin 22 but made no effort to find out who might have placed them there. He could have put them there himself and at the least was responsible for moving them to the enclosure once he became aware of the contents of those crates. Instead, he informed the intelligence agents of their position knowing that to an uwary truck driver or forklift operator they

would appear to be ready for loading, when the contents of bin 22 were hauled away because the practice and custom was to remove the contents of the bin to either side for the purpose of loading. Furthermore, Watling was unable to make available during the trial the records, notes and secret diary he said he had maintained when "fishing around" the scrap yard, because he had conveniently destroyed all of them before trial.

In order to further establish theft of property and it's value, the prosecution attempted to qualify Anthony Rose as an expert. His principal qualification was that he had worked in a government scrap yard in northern California. He admitted that he knew absolutely nothing about jet engines. He told the jury that many of the scrapped items in bin 22 such as gauges, instruments and

other items should not have been scrapped as nonusable despite the fact the people qualified to use these items had determined them to be not functional and not usable and sent them to the nonusable scrap yard. Rose admitted he did not perform a single test on any of the items to determine if they actually worked or could be used.

He also told the jury there was no paper on these items despite the fact photographs of the items which were admitted into evidence clearly displayed tags attached to the items indicating why they were scrapped.

When defense counsel attempted to demonstrate his lack of qualifications by asking him the basis of the assumptions for his opinions the Court admonished counsel in front of the jury that the witness could not be questioned on

his assumptions.

Rose told the jury that the value of those items was the price the government would have to pay if they were brand new and perfectly functional when calculating the loss to the government for that purpose. He read to the jury from price lists. In view of the evidence presented in the case, the prosecution introduced facts into his closing argument which were false and not in evidence. First he told the jury that the Naval Intelligence agents knew appellant would be the person hauling for the purchaser of bin 22 and that is why they marked the boxes. Next, he told them they had been after the petitioner for years. Finally, he told the jury in argument that petitioner was part of a scheme to steal valuable parts in order to furnish them illegally to foreign governments

thus making petitioner a traitor to his own Country. These statements made in closing argument were not only untrue but there was absolutely no such evidence presented at the trial.

The defense moved for a judgment of acquittal and a new trial both of which were denied.

After this, petitioner appealed to the U.S. Court of Appeals for The Ninth Circuit but that Court summarily confirmed the practice of denying counsel voir dire examination and the trial Court's discretion to restrict cross-examination. It did not consider the prosecution's closing argument to be to gross and completely disregarded the standard set by this court in Berger v. U.S., 295 U.S. 78, 55 S.Ct. 629 (which petitioner had raised on appeal) and affirmed the judgment of the trial court.

ARGUMENT

The growing practice of the Ninth Circuit of denying counsel the right to voir dire the jurors should be changed. In addition to the voir dire by the court counsel should be permitted some voir dire no matter how limited. The court should be allowed to limit the number of questions and the time permitted for asking those questions but should not foreclose completely any voir dire by counsel.

This case illustrates some of the disadvantages of the very limited voir dire conducted by the court which resulted in petitioner being compelled to acacept eleven rather than twelve jurors.

What occurred in this case illustrates the result of this arbitrary denial by the court of proper inquiry. Seldom will a juror admit to a prejudice because

in their mind they justify their predisposition either morally or rationally. The juror who was excused by the court after the jury had been impaneled must have been surprised by the limited inquiry made by the court in voir dire examination. If the areas of inquiry in the questions submitted to the court by defense counsel had been addressed to the jury the court itself might have excused other jurors or at least counsel could intelligently exercise their challenges Rosales-Lopez v. U.S., 101 S.Ct. 1629, U.S. vs. Pimentel, 654 F.2d 538. A voir dire that has the effect of impairing a defendant's ability to exercise intelligently his challenges is ground for a reversal, irrespective of prejudice U.S. v. Rucker, 557 F.2d 1046, U.S. vs. Lewin, 467 F.2d 1132 and Swain vs. Alabama, 380 U.S. 219, 85 S.Ct. 824. There are

no cases to the contrary.

If the court in it's limited voir dire impresses upon the jury that their function is simply follow the directions of the court then a defendant has been denied a fair trial and due process of law guaranteed by the U.S. Constitution.

Once the Court has accomplished that impression by it's voir dire, the exercise of it's discretion during the course of the trial is viewed by the jury as a mandate to them. Then, when the Court restricts counsel's inquiry into the qualifications of the government expert witness, as was done in this case, the jurors will think the Court is endorsing the testimony of that witness. Especially, when the purpose of the voir dire had been to obtain assurances from the jurors that they would follow the Court's directions. In this case the testimony of

the government expert witness was critical. The conduct of the voir dire examination and abuse of the Court's discretion in restricting counsel's examination of the expert effectively deprived the jury of their task of carefully considering and weighing the evidence and thereby deprived petitioner of his right to a fair trial and due process under the Fourteenth Amendment to the U.S. Constitution.

By the time the prosecution is telling the jury, in closing argument, that he has more facts than were presented by the evidence and that his case is curtailed by the statute of limitations, defense counsel is put in a dilemma. If the Court overrules an objection to that kind of argument by the prosecution, petitioner's conviction is certain. That kind of endorsement by the Court would leave the jurors no alternative since the prosecu-

tion has described petitioner as an enemy of the U.S.

A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution insinuating he has knowledge of facts which are calculated to prejudice the opposite party. He cannot testify in his argument and present facts for the consideration of the jury not in evidence Taliferro v. U.S., 47 F.2d 699.

There is a civilian market for used aircraft parts similar to that of used auomobile parts. Appellant is not a truck driver hauling parts for weapons.

The U.S. Court of Appeals did not respond when petitioner raised the holding of this Court in Berger v. U.S., 295 U.S. 78, 55, S.Ct. 629 which holds the U.S. Attorney as the representative not of an ordinary party to a controversy

but of a sovereignty whose obligation to govern impartially is as compelling as it's obligation to govern at all.

He has a duty to refrain from any improper methods calculated to produce a wrongful conviction. The conviction of petitioner illustrates the sad effect of the prosecution depriving a person of a fair trial by resorting to prejudicial misconduct to compensate for insufficient evidence. Petitioner should at least be given a new trial and hopefully a fair one.

CONCLUSION

The foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

2-9-83

J. KENNETH JENSEN
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